BOARD OF INQUIRY (*Human Rights Code*)

OCT 5 1998

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Adam Tilberg, dated March 25,1993, alleging discrimination in employment on the basis of handicap.

B E T W E E N :

Ontario Human Rights Commission

- and -

Adam Tilberg

Complainant

- and -

McKenzie Forest Products Inc.

Respondent

DECISION

Adjudicator : Katherine Laird

Date : October 2, 1998

Board File No: BI-0111-97

Decision No : 98-016

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Raj Dhir, Counsel
Tim Tilberg, Complainant	)	Gerald Rayner, Counsel
McKenzie Forest Products Inc.	)	Nigel Campbell, Counsel

INTRODUCTION

The complaint before the Board of Inquiry in this proceeding alleges discrimination in employment on the basis of handicap, pursuant to s. 5(1) of the *Human Rights Code* ("*Code*"). The complainant, Adam Tilberg, alleges that he was refused employment with the respondent, McKenzie Forest Products Inc., because of the fact that he was born without thumbs.

This decision deals with a preliminary motion brought on behalf of the respondent. The motion seeks an order dismissing the complaint on the basis that the Board of Inquiry has lost jurisdiction. It is the position of the respondent that the Ontario Human Rights Commission ("Commission") has taken certain steps in respect of this proceeding which have the necessary effect of terminating the right of the complainant to have his complaint adjudicated by the Board of Inquiry. The factual and legal nature of the steps taken by the Commission are at issue in this motion, but there is no dispute that the Commission has, at minimum, advised the other parties and the Board that it was withdrawing as a participant in the hearing on the merits.

The motion brought by the respondent raises issues with respect to the status of the statutory parties before the Board of Inquiry. The introduction of mediation conferences as part of the pre-hearing process at the Board of Inquiry has resulted in a high rate of settlement, but has also raised procedural, substantive and jurisdictional issues not fully anticipated in the legislation. These issues could be addressed by legislative amendments clarifying, at minimum, the role and status of the various parties to human rights proceedings. However, for the reasons set out below, I have determined that, notwithstanding the steps taken by the Commission, the Board of Inquiry retains jurisdiction to hear and decide the complaint filed by Adam Tilberg.

The preliminary motion of the respondent is dismissed. The hearing will re-convene on October 19, 1998 in Thunder Bay, commencing at 12:30 in the afternoon. Further, the time period set for additional disclosure by the respondent, as ordered at the hearing on June 29, 1998, is hereby abridged to seven days from the date of this decision, that is to October 9, 1998.

FACTUAL BACKGROUND TO MOTION

On March 23, 1993, Adam Tilberg filed his complaint against McKenzie Forest Products with Commission. The complaint was received by the Board on February 17, 1997, by referral from the Commission.

The hearing commenced by telephone conference call held on March 13, 1997. In accordance with the *Rules of Practice* of the Board of Inquiry, the parties agreed to a schedule for filing pleadings, and disclosure of documents. A mediation date was set for June 9, 1997, and a pre-hearing conference set for June 23, 1997. In fact, following the first mediation, a second session was scheduled, but prior to that date, counsel for the Commission wrote to the Board to advise that the Commission had decided that it would no longer participate in the hearing before the Board. The text of this letter, dated October 14, 1997, is as follows:

> As already discussed with Mr. Fricot [in-house counsel for respondent] and Mr. Tilberg, the Ontario Human Rights Commission has decided to no longer participate in the Board of Inquiry process, and will not be pursuing the complaint filed by Mr. Tilberg.
>
> As such, the Commission does not intend to tender any evidence at a Board of Inquiry hearing should this matter proceed, nor will the Commission be participating in any further mediation sessions which may be scheduled.
>
> The complainant, Tilberg, is aware of his right to proceed with this matter on his own. I understand that he is considering this option, and wishes to consult with his own legal counsel. It is probable that he will not be able to do so before the next scheduled mediation date. Therefore, the Commission suggests that the Complainant and the Respondent Party be consulted as to the suitability of the mediation date set for October 27, 1997 in Thunder Bay.

As a result of this letter, the scheduled mediation was cancelled by the Registrar. In order to allow Mr. Tilberg sufficient time to retain counsel, a conference call to set further dates in this matter was scheduled for December 23, 1997 . On that date, the Registrar of the Board, at the request of the parties, set a further mediation date of February 27, 1998, and a pre-hearing date of March 26, 1998. On March 16, 1998, Mr. Tilberg wrote to the Registrar advising that, at the

pre-hearing conference on March 26, he would be seeking a disclosure order as against the Commission. On March 18, 1998, Mr. Tilberg wrote again to the Board to advise that he had retained his own counsel, Gerard Raynor, and that Mr. Raynor would be available to represent him at the pre-hearing. However, on March 23, 1998, Mr. Raynor wrote to the Registrar requesting a one-month adjournment of the pre-hearing conference in order to have more time to become familiar with the file. Counsel for the respondent consented to the adjournment.

In the circumstances, the Registrar brought the adjournment request to my attention, and I determined that the pre-hearing conference should proceed by telephone on March 26, 1998, and that the Commission should receive notice. The Commission did participate in the call, and responded to my questions with respect to disclosure of the Commission's file to the complainant. In addition, Commission counsel advised the Board again that it was withdrawing from the hearing and suggested that it would no longer be a party at the hearing. I acknowledged that the Commission was taking the position that it could or had withdrawn, but reminded the parties that I had made no determinations with respect to the continuing status, if any, of the Commission. At this point, counsel for the Commission exited from the call.

In the absence of Commission counsel, it was determined that, given the Commission's non-participation in the hearing, revised pleadings should be filed. A schedule was set for the exchange and filing of pleadings, for additional disclosure and for the exchange of witness lists. At this point in the conference call, respondent counsel advised the Board that it would be bringing a preliminary motion for dismissal on the basis that the complainant was unable to proceed without the Commission's participation in the hearing. In addition to relying on the October 14, 1997 letter, set out above, counsel advised the Board that it would be relying on a further letter, also dated October 14, 1997, in which Commission counsel confirmed that the respondent was to provide a "letter of assurance" to the Commission "as a condition of withdrawing".

The respondent's motion for dismissal was scheduled for argument on June 29, 1998, after the exchange of revised pleadings and after the parties had an opportunity to consider if further mediation efforts would be useful. The Commission was notified of the motion and attended to make submissions.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Counsel for the respondent took the position that the jurisdiction of the Board of Inquiry was contingent on the Commission's participation in the hearing. Pursuant to the legislation, only the Commission can refer a human rights complaint to the Board for a hearing and the Commission is identified as the party with carriage of the complaint before the Board. Counsel argued that, by necessary implication, if the Commission, as in this case, advises the Board that it will "no longer participate in the Board of Inquiry process" and that it will not be tendering evidence at the hearing, the correct interpretation is that the Commission has withdrawn the complaint from the Board itself. Counsel argued that in these circumstances, the Board no longer had jurisdiction to fulfill its statutory duty under s. 39(1)(a) to determine whether or not a right of the complainant under the *Code* has been infringed.

Respondent counsel noted that the letter of assurance was provided as a condition for the Commission's withdrawal. Although the respondent knew, at the time the letter was provided, that the Commission took the position that the hearing could continue in its absence, it was argued that there was prejudice to the respondent given that such an interpretation was inconsistent with the overall scheme of the *Code*. In particular, counsel submitted that, if the hearing was allowed to continue, the Board would inappropriately convert itself into a civil court with jurisdiction to decide a dispute between two private parties. Characterizing the *Code* as a statute for the enforcement of a public interest, it was argued that the legislation did not contemplate a two-party adversarial process without the safeguards and protections which are built into the civil justice process.

SUBMISSIONS ON BEHALF OF THE COMPLAINANT

Counsel for the complainant argued that the legislation did not allow the Commission to withdraw from a proceeding before the Board of Inquiry. Once the Commission refers a complaint to the Board under s. 36(1), there is no express provision in the legislation for withdrawal or reconsideration of the referral. In the alternative, counsel argued that, if the Commission was entitled to withdraw, there would be no prejudice to the respondent from the continuation of the hearing. The respondent realized, before providing the letter of assurance, that the complainant had not abandoned his claim. In fact, it was argued that the only prejudice was to the complainant, who had received no personal benefit from the letter of assurance, and was at this late stage, expected to pick up the costs of legal representation at the hearing.

On the question of jurisdiction, counsel argued that it could not have been intended that the Board's continuing jurisdiction depended on the on-going participation of the Commission in the proceedings, given that, at the hearing stage, the Commission is only one of three or more parties before the Board. The party status of the complainant under s. 39(2) of the *Code* would be meaningless if the Commission could bring the proceedings to an end at any point by withdrawing from participation in the hearing.

SUBMISSIONS OF THE COMMISSION

Counsel for the Commission took the position that, after referral of a complaint to the Board of Inquiry, the Commission has no authority to withdraw the complaint from the Board. Pursuant to s. 36(1) of the *Code,* the Commission refers "the subject-matter of the complaint" for a hearing and becomes a party before the Board, relinquishing, in the words of counsel, its prior "jurisdiction over the complaint".

Although the Commission cannot withdraw a complaint, counsel argued that the Commission could withdraw itself *from* the complaint, and *from* the hearing, without affecting the jurisdiction of the Board to hear and decide the complaint in its absence. Counsel noted that the Commission

has in the past withdrawn from hearings in circumstances where it has been able to negotiate a remedy in respect of the public interest aspect of a complaint. In every case in which the Commission has withdrawn, the Board has allowed the complainant to continue to present his/her case at the hearing, although the jurisdictional issue has only been fully argued in one decision: *Shapiro v. Regional Municipality of Peel* (1997), 29 C.H.R.R. D/77. In that decision, relied upon by the Commission, the Board of Inquiry found *inter alia* that the party status of the complainant under s. 39(2) of the *Code*, necessarily gave her the right to continue before the Board in the absence of the Commission.

Counsel argued further that, given the authority in s.41(4) of the *Code* to order costs against the Commission, and the developing jurisprudence exercising that authority, the Commission has no choice but to actively assess and re-assess its participation in hearings in light of any settlement concessions made by the respondent in the course of the mediation process at the Board of Inquiry.

FINDINGS

In the circumstances of this case, I find that the Commission has taken steps to abandon active carriage of the referred complaint before the Board of Inquiry. The Commission has advised the parties and the Board that it will not be participating in the hearing. Notwithstanding the position taken by counsel for the Commission on the March 26, 1998 conference call, it was not argued at the June 29, 1998 hearing that the Commission had withdrawn as a party before the Board. The Board has no express jurisdiction under the *Code* to remove the Commission as a statutory party. Further, I find that the Commission has not withdrawn, and cannot withdraw, as a party before the Board of Inquiry. The jurisdiction of the Board to order costs against the Commission upon dismissal of the complaint, can only mean that the Commission remains subject to the Board's jurisdiction until final disposition of the proceeding. The Board cannot be in a position to assess whether a costs order under s. 41(4) of the *Code* would be appropriate until it has made its final determinations.

Further, I accept the submissions of the Commission counsel to the effect that the Commission itself lacks the authority to withdraw a complaint which has been referred for a hearing. After referral of a complaint to the Board, the Commission loses its status as 'gatekeeper' to the hearing process and becomes a party to the hearing, albeit the party with statutory carriage of the complaint. From the point of referral, the Board is under a statutory duty to hear a complaint on its merits unless all the parties otherwise consent: s. 39(1) of the *Code* ; s. 4.1 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 ("*S.P.P.A.*"). Although there is some jurisprudence holding that the Board has authority to discontinue a proceeding to prevent abuse of its processes under s. 23 of the *S.P.P.A.,* this was not at issue in this case. The Commission is only one of at least three parties before any board of inquiry, and cannot, on its own, have the ability to cause the tribunal to lose jurisdiction.

Given that the Commission cannot withdraw a complaint, can the Commission withdraw *from* a complaint, or from the hearing into the complaint? Counsel for the Commission and the respondent both took the position that the Commission could, and had in fact, withdrawn from the complaint, differing, as we have seen, on whether there was a resulting impact on the Board's jurisdiction. In my view, the correct interpretation is that the Commission has merely declined to take carriage of the complaint at the hearing on the merits. In the absence of the Commission, the complainant can rely on his statutory status as a party to the proceeding to present the evidence and arguments in support of the merits of the complaint: *Shapiro*, *supra*. Specific statutory language would be required to support a finding that the complainant's party status, and the right to a hearing on the merits, could not survive a Commission decision to not participate in the hearing of a complaint.

With reference to the respondent's argument that to continue the hearing would be to inappropriately take jurisdiction for adjudicating a private dispute, I note that human rights adjudication almost always involves a determination in respect of individual rights and remedies, in addition to the public interest aspects. Complainants who are successful before the Board of Inquiry are entitled to an order compensating them for their losses arising out of the infringement

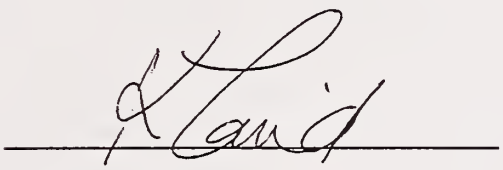
of their rights, including special damages. Given the decision of the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v. Bhadauria* (1981), 124 D.L.R. (3d) 193, human rights complainants will seldom have another forum for seeking redress.

If, as in this case, the Commission decides that it will not take carriage of the complaint at the hearing, can the Board order the Commission to fulfill this aspect of its statutory role in the human rights enforcement process? What does the concept of carriage involve and what would it mean to require the Commission to retain active carriage of the complaint at the hearing on the merits? These issues was not fully argued before me. Counsel for the complainant took the position that the Commission should continue to have carriage, but did not specifically address the content of such a requirement or the authority of the Board to order participation by the Commission.

Given that the Commission remains a party before the Board, I am satisfied that it is within my jurisdiction, in appropriate circumstances, to order the Commission to comply with the Board's *Rules*, for example with respect to disclosure. Further, in my view, it is appropriate for the Board to continue to give the Commission notice of the on-going proceedings, even though the Commission is not attending and accordingly is not entitled to notice under s.7(1) of the *S.P.P.A.* In some situations, such as the present motion, the Board may advise the Commission that it would be helpful if it made submissions on a point of interpretation of the *Code.* As well, it is of course incumbent on the Board to give notice to the Commission, and an opportunity to make submissions, should there be a motion for costs at the end of a hearing in which the Commission chose not to participate. However, I also note that a decision-maker cannot require a party to present evidence or argument on a particular point in issue. In the absence of full argument, I am unwilling to make a determination as to whether the Board of Inquiry could, and should in the present case, order the Commission to retain, or take back, active carriage of this complaint. Even if the Board does have the authority to require the Commission to assume active carriage of the complaint at the hearing, there are negative public policy ramifications weighing against making

such an order, as discussed in *Burney v. University of Toronto* (1995), 23 C.H.R.R. D/90 at para. 34 (Ont.Bd.Inq.).

Dated at Toronto this 2nd day of October, 1998:



Katherine Laird
Member, Board of Inquiry